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Supreme Court, U.S.
FILED

03 400 SEP 4 2003

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No.

IN THE SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF CALIFORNIA, *Petitioners,*

v.

ROBERT HARTLEY COLLINS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI AND APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Martinez v. Court of Appeal of California,* 528 U.S. 152, 161 (2000), this Court held that a criminal defendant's right to self-representation is "confined to the right to defend oneself at trial." In *McKaskle v. Wiggins,* 465 U.S 168, 177 n.8 (1984), this Court stated that a denial of the right to self-representation "is not amenable to 'harmless error' analysis" because exercise of the right "usually increases the likelihood of a trial outcome unfavorable to the defendant."

In this case, the trial court denied Collins's request to represent himself for the purpose of pleading guilty, but Collins thereafter elected to submit the case to the trial court on the preliminary hearing transcript alone, without presenting any defense - - a procedural device known in California as a "slow plea." Though Collins achieved his intended determination of guilt by use of the "slow plea," the California Court of Appeal nevertheless reversed the judgment based upon the denial of Collins's right to self-representation.

The questions presented are:

1. Does the right of self-representation, as recognized by this Court in *Faretta v. California*, 422 U.S. 806 (1975), of necessity extend to a criminal defendant who seeks to represent himself only to plead guilty?

2. If the right of self-representation extends to a criminal defendant who seeks to represent himself and plead guilty, is an erroneous denial of the right amenable to harmless error analysis when the defendant personally and purposefully forfeits the right to present a defense (a "slow plea") and thereby obtains the same disposition of the charges and sentence he would have received had he pled guilty without counsel?

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IN THE SUPREME COURT OF THE UNITED STATES

No.

PEOPLE OF THE STATE OF CALIFORNIA, *Petitioners,*

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OPINIONS BELOW

The unpublished opinion of the California Court of Appeal, Fourth Appellate District, Division Three (App., *infra*, 1-12) is unreported. The California Supreme Court's denial of review (App., *infra*, 13) is unreported.

STATEMENT OF JURISDICTION

On March 24, 2003, the California Court of Appeal, Fourth Appellate District, Division Three, filed its opinion

reversing the judgment. On June 11, 2003, the California Supreme Court denied the petition for review. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the Constitution of the United States provides in relevant part: "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."

The Fourteenth Amendment of the Constitution of the United States provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

A. Facts Relating to Collins's Crimes

On December 19, 1997, Collins sexually assaulted and threatened to kill his former wife, Jennifer. Collins used a

ruse to enter Jennifer's apartment and concealed a bottle of chloroform with the intent to incapacitate her. In the apartment's kitchen, Collins placed a rag doused with chloroform over Jennifer's face and the two struggled and fell to the floor. Jennifer hit Collins on the head with a water glass, which caused him to drop the rag, but in the next moment he procured a knife from the kitchen counter, held it to her throat, and dragged her into the living room. Collins poured chloroform onto one of the couch pillows and again attempted to render Jennifer unconscious, but stopped when their daughter entered the living room. Seeing the child, Collins ordered her to her room and then dragged Jennifer into the master bedroom, where he forced Jennifer to the floor and threatened to kill her. He eventually told Jennifer to get on her knees, and while holding the knife, commanded her to orally copulate him. She did so twice. Collins then bound and gagged Jennifer and said that he badly wanted to kill her. He said he had been planning to do so for a long time, but eventually freed Jennifer after a

two-hour ordeal.

B. The Criminal Proceedings Against Collins

On March 23, 1998, the Orange County District Attorney filed an information charging Collins with forcible oral copulation (Count 1; Cal. Pen. Code § 288a, subd. (c)), assault with intent to commit rape (Count 2; Cal. Pen. Code §§ 220, 261, subds. (2)(3)), corporal injury on the mother of a child (Count 3; Cal. Pen. Code § 273.5, subd. (a)), first degree burglary (Count 4; Cal. Pen. Code §§ 459, 460, subd. (a)), false imprisonment by violence (Count 5; Cal. Pen. Code § 236), and misdemeanor child abuse (Count 6; Cal. Pen. Code § 273a, subd. (b)). The information further alleged that, in conjunction with Count 1, Collins used a deadly weapon (Cal. Pen. Code § 12022.3, subd. (a)) and that the crime was punishable under California's one-strike rape law because of the residential burglary and weapon use. Cal. Pen. Code § 667.61, subds. (a), (b), (e)(2)(4). In this situation, the one-strike rape law mandates

a sentence of twenty-five years to life.

On September 11, 1998, Collins pled guilty to counts 1 through 6 and admitted the weapon-use allegation. In exchange, the prosecutor struck the one-strike rape allegations, which left a potential maximum prison term of twenty-two years and eight months rather than a mandatory indeterminate life term. At sentencing, however, Collins was deeply moved by the statements of the victim and her sister and asked the trial court to reinstate the one-strike rape allegations and put him in prison for life. He threatened to commit crimes in prison to extend his sentence if the trial court refused.

At a later hearing, the trial judge set aside the plea and reinstated the criminal charges because it could not sanction the plea bargain when Collins was threatening to commit future crimes. Collins then fired his retained attorney and asked to represent himself because he wanted to plead guilty to all the charges. This colloquy took place between Collins and the court:

Court: "Before you make a decision like this, Mr. Collins, would you like to talk to another lawyer?"

Collins: "No."

Court: "And your intention is essentially to plead guilty to everything; is that right?"

Collins: "Yes."

This prompted the trial court to appoint a psychologist to determine whether Collins had the capacity to represent himself. On May 21, 1999, the court found that Collins did not have the mental capacity to make a knowing and intelligent waiver of his right to an attorney. The court denied Collins's request for self-representation and appointed a lawyer.

On July 9, 1999, the appointed lawyer asked the court to conduct an evaluation to determine whether Collins was competent to stand trial. Cal. Pen. Code § 1368. On August 27, 1999, the court found that Collins had not rebutted the presumption of mental competence and reinstated criminal

proceedings. This necessarily meant that Collins was also competent to represent himself. *Godinez v. Moran*, 509 U.S. 389, 400-01 (1993).

On November 19, 1999, the appointed lawyer told the court that Collins wanted to submit the case on the preliminary hearing transcripts. In California, this is commonly called a "slow plea," and it requires essentially the same personal waivers as a guilty plea. *Bunnell v. Superior Court*, 13 Cal.3d 592, 604-05, 119 Cal.Rptr. 302 (1975). In conformance with that procedure, Collins waived his right to a jury trial and to confront and cross-examine witnesses. The court explained that the prosecution would submit the case on the preliminary hearing transcripts and police reports. The court informed Collins that he retained the right to present evidence and to remain silent, but given the evidence presented in the preliminary hearing, there was a "high likelihood" that he would be "convicted."

At the subsequent hearing, the defense presented no evidence and no argument. Consequently, the trial court found Collins guilty of all charges and found true the one-strike rape allegations, and sentenced Collins to a mandatory indeterminate prison term of 25 years to life. This was the exact disposition and sentence Collins sought when he had sought to represent himself.

C. Collins's Appeal

Collins appealed and asserted that the trial court's denial of his request for self-representation violated *Faretta v. California*, 422 U.S. 806, 807 (1975). The California Court of Appeal, Fourth Appellate District, Division Three, reversed Collins's conviction for *Faretta* error. The Court of Appeal held that the "type of error" exhibited in this case was subject "only to the reversible per se standard." App., *infra*, 6. The California Supreme Court denied review. App., *infra*, 13.

REASONS FOR GRANTING THE WRIT

In reversing Collins's conviction, the California Court of Appeal reasoned that *Faretta* grants a criminal defendant the right to self-representation even if he intends to do nothing other than to plead guilty, and held that, even though Collins accomplished his intended result by the device of a "slow plea," the denial or the right of self-representation was reversible per se.[1/] App., *infra*, at 6. The State of California respectfully asks this Court to grant this Petition for Writ of Certiorari to decide whether the "right to defend oneself at trial," guaranteed by *Faretta*, has application and meaning when a criminal defendant wants to plead guilty, and if it does, whether such error should be reversible per se in a situation where a defendant receives the precise disposition and sentence he wanted after a personal,

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1. The appellate court relied on the California Supreme Court's reading of *Faretta* to preclude a harmless error analysis. *See People v. Joseph*, 34 Cal.3d 936, 196 Cal.Rptr. 339 (1983). The *Joseph* decision anticipated this Court's similar observation the next year in *McKaskle*, 465 U.S. at 177 n.8.

purposeful relinquishment of his right to present a defense at trial.

ARGUMENT

I.

THE RIGHT TO SELF-REPRESENTATION IS MEANINGLESS AND SHOULD NOT APPLY WHEN A CRIMINAL DEFENDANT INTENDS TO PLEAD GUILTY

This Court's seminal decision in *Faretta* holds that a state may not force a lawyer upon a criminal defendant "when he insists that he wants to conduct his own *defense*." *Faretta,* 422 U.S. at 807 (emphasis added). The opinion stresses that the Sixth Amendment "constitutionalizes the right in an adversary criminal trial to make a defense as we know it." *Id.* at 818. In this case, Collins did not want to conduct a defense at all and personally elected not to. *Faretta's* language strongly suggests that the right to self-representation loses its meaning and content when a criminal defendant wants to plead guilty, or when a defendant otherwise voluntarily relinquishes the right to present a "defense" in an "adversary criminal trial," as Collins did here.

This reading of *Faretta* garners strength from the Court's recent decision in *Martinez v. Court of Appeal of California*, 528 U.S. 152 (*Martinez*). In *Martinez,* this Court held that the right to self-representation did not extend to appeal, and in so doing, explicitly stated that *Faretta* "extended only to a defendant's 'constitutional right to conduct his own defense.'" *Id.* at 154. The decision further explained that *Faretta's* "specific holding was confined to the right to defend oneself at trial." *Id.* The Court also stated that, "Although we found in *Faretta* that the right to defend oneself at trial is 'fundamental' in nature [citation], it is clear that it is representation by counsel that is the standard, not the exception." *Id.* at 161. Thus, the language in *Martinez* powerfully suggests that the right to self-representation is not constitutionally significant or meaningful when a defendant wants to plead guilty or abandons any and all defense.

The policies underlying *Faretta* also support the conclusion that a constitutional right to self-representation has

no meaning outside an *adversarial* trial. *Faretta* explained that the "right to defend is personal" because it is the defendant, not the lawyer, who will bear the consequences of conviction. *Faretta*, 422 U.S. at 834. The Sixth Amendment therefore guarantees that the "defense is not stripped of its personal character" and ensures that the appointed lawyer does not become the defendant's "master." *Id.* at 820. The accused must acquiesce in representation so that the defense adopted at trial is "*his* defense." *Id.* at 821.

This reasoning does not apply when a defendant wants to plead guilty or otherwise relinquish the right to present a defense at trial. A criminal defendant always retains complete control over the decision whether to plead guilty, even if the defendant is represented by counsel. *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966). Thus, even if a defendant's request to proceed without counsel is denied, the defendant retains the exclusive, personal decision whether to plead guilty unimpeded by counsel. In this posture, counsel's role is little more than

advisory, as the court must deal personally with the defendant. In plea proceedings, and similarly California's "slow plea" procedure, the judge must take voluntary, knowing, and intelligent waivers from the defendant personally. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Bunnell v. Superior Court*, 13 Cal.3d at 605; Cal. Pen. Code § 1018. The outcome of these proceedings is certain, or all but certain, and this consequence is explained to the defendant beforehand. A defendant has little interest in securing formal or nominal self-representation because these proceedings are almost exclusively a colloquy between the court and the defendant regarding the waivers and the probable disposition, and the defendant controls the proceedings to the exclusion of counsel. As such, there is no chance the defendant's personal choices will be overcome by the defense lawyer, who acts more like advisory counsel than an advocate.

The reach of the *Faretta* right in a guilty plea proceeding has not been addressed by this Court. As evidenced

by the unpublished opinion of the California Court of Appeal, the lower courts seemingly assume from a broad reading of *Faretta's* language that the right to self-representation applies equally in non-adversarial guilty plea and slow plea proceedings. Thus, absent clarification by this Court, the lower courts are not likely to make this important distinction and cases will be unnecessarily reversed. *See People v. Robinson,* 56 Cal.App.4th 363, 370, 65 Cal.Rptr.2d 406 (1997). Accordingly, the State of California asks this Court to grant this Petition for Certiorari in order to clarify whether the right to self-representation has any meaning and effect when a defendant wants to plead guilty.

II.

EVEN IF A RIGHT TO SELF-REPRESENTATION EXISTS FOR PURPOSES OF PLEADING GUILTY, AN ERRONEOUS DENIAL OF THE RIGHT SHOULD BE SUBJECT TO HARMLESS ERROR REVIEW

This Court held *Faretta* error was reversible per se in *McKaskle v. Wiggins,* 465 U.S 168. "Since the right to self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis." *Id.* at 177 n. 8. In the next paragraph, the Court stated, "Moreover, the defendant's right to proceed *pro se* exists in the larger context of *the criminal trial designed to determine whether or not a defendant is guilty of the offense with which he is charged.*" *Id.* at 177-178 (emphasis added). Similarly, this Court's decision in *Arizona v. Fulminante,* 499 U.S. 279 (1991), stated that the rule of per se reversal applies to the "the right to self-representation at *trial.*" *Id.* at 310 (emphasis added).

Nothing in this Court's jurisprudence suggests that a rule of per se reversal is applicable when, after being denied the right to self-representation for purposes of pleading guilty, a defendant voluntarily relinquishes the right to defend himself at trial. A "slow plea," like a guilty plea, foregoes the right to present a defense which is at the very heart of *Faretta*. Yet, the California Court of Appeal in this case uncritically assumed that the *Faretta* error was reversible per se.

A rule of per se reversal makes no sense when the defendant seeks to represent himself and plead guilty. And it makes even less sense when the defendant, with counsel, actually submits the case to the trial judge on the preliminary hearing transcripts and police reports — after he waives his right to a jury trial, after he waives his right to confront and cross examine witnesses, after he is told there was a "high likelihood" that he will be "convicted," and after he presents absolutely no evidence or argument in his defense. A rule of per se reversal makes no sense when one considers that Collins got the exact

disposition and sentence that he sought at the time he requested to represent himself for the purpose of pleading guilty. As this Court has recognized, a rule of per se reversal should not be applied when a reviewing court can make an "intelligent assessment" based on the record of the effect of the error. *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988).

By this automatic reversal, Collins has effectively obtained the same relief for which he would have been required to demonstrate cause, had he had such a change of heart in the trial court and sought to change (withdraw) his "slow plea." Cal. Penal Code § 1018. And, ironically, if this reversal stands and Collins requests representation on remand, then the "error" in refusing to permit him to represent himself for the purpose of pleading guilty will be "cured" by affording Collins a jury trial while represented by appointed counsel. Cf., *People v. Dent*, 30 Cal.4th 213, 224, 132 Cal.Rptr.2d 527 (2003) (Chin, J., concurring) ("If [on remand] he does request counsel, then all that the trial court's error in denying self-representation will

have accomplished is to give defendant two trials, not just one, in which he is represented by counsel. This result is hard to explain in any rational manner.")

Faretta's primary purpose is to protect a defendant's dignity interest, but in this case there was little or no affront to that interest because Collins ultimately got the precise disposition and sentence he wanted, and he was never forced to present an unwanted defense to a court or a jury. Collins personally managed his "slow plea" and directly dealt with the court in making it. Assuming that the Constitution guarantees a criminal defendant the right to self-representation in a guilty plea proceeding, there is no sense in making the denial of the right reversible per se.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Dated: September 2, 2003

Respectfully submitted,

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APPENDIX A

APPENDIX A

[Filed Mar 2 4, 2003]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION THREE

THE PEOPLE,	)	
	)	GO27376
Plaintiff and Respondent,	)	
	)	(Super. Ct. No. 97NF3729)
v.	)	
	)	**OPINION**
ROBERT HARTLEY COLLINS,	)	
	)	
Defendant and Appellant.	)	

Appeal from a judgment of the Superior Court of Orange County, Frank F. Fasel, Judge. Reversed.

Jeffrey J. Stuetz, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Acting Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Robert M. Foster, Supervising Deputy Attorney General, and Gary W. Brozio, Deputy

Attorney General, for Plaintiff and Respondent.

The trial court found defendant Robert Hartley Collins guilty of forcible oral copulation (Pen. Code, 288a, subd. (c); all further statutory references are to the Penal Code unless otherwise indicated), assault with intent to commit rape (§§ 220,261, subd. (a)(2), (3)), corporal injury on the mother of a child (§ 273.5, subd. (a)), first degree burglary (§§ 459,460, subd. (a)), and false imprisonment by violence (§ 236). During pretrial proceedings, the court rejected the parties' negotiated plea bargain, reinstating charges punishable under California's "One Strike" law (§ 667.61, subds. (a), (b) & (e)(2), (4)) and denied defendant's self-representation request. On appeal, defendant challenges his conviction on numerous grounds. We conclude the trial court committed reversible error by denying defendant's motion to represent himself and remand the matter for further proceedings.

FACTS

Since we reverse the conviction on a procedural ground, a detailed summary of the evidence is unnecessary.

The prosecution alleged that in the middle of the night, defendant, using a ruse, gained access to his ex-wife's residence. Over a span of several hours, defendant threatened her with a knife, forcing her to orally copulate him. Defendant then bound and gagged his ex-wife, eventually releasing her approximately two hours later before falling asleep. Defendant's ex-wife immediately left the apartment with her two children, including defendant's daughter, and contacted the police.

Initially, the parties reached agreement on a plea bargain whereby defendant pleaded guilty to all charges and admitted the weapon use, and the prosecution dismissed the One Strike allegations, reducing defendant's prison term to a potential maximum of 22 years and 8 months.

During the sentencing hearing, defendant asked the court to reinstate the One Strike allegations so he could have a life sentence, claiming it was for his ex-wife's peace of mind. Defendant threatened that he would get into trouble in prison if he received anything less than a life sentence.

During the one-week continuance, defendant sent a letter to the court explaining he intended to engage in nonviolent crimes in order to extend his sentence.

When the sentencing hearing resumed, the court set aside the plea bargain and reinstated the original charges in the interest of public safety after considering defendant's express intent to commit future crimes in prison. At the same hearing, the court relieved defendant's counsel at defendant's request. The court later denied defendant's request to represent himself based on psychological evaluations showing defendant did not have the capacity to make a knowing and intelligent waiver of his right to an attorney. But the court also determined, based on the same evaluations, that defendant was competent to stand trial. Thereafter, defendant waived his right to a jury trial and submitted to a court trial based on the preliminary hearing transcript and other documents.

DISCUSSION

Denial of Defendant's Request for Self-Representation - Standard of Reversal

After the court reinstated the One Strike charges, the court granted defendant's request to relieve his counsel and agreed to take under submission his motion for self-representation. The court refused to rule on the latter motion until defendant was reevaluated by court-appointed psychologists to determine "whether or not [defendant] [had] the mental capacity to represent [himselfl." Guided by the evaluations, the court ultimately deemed defendant psychologically and emotionally incapable of making a knowing and intelligent waiver of his right to a lawyer. But subsequently, at defendant's lawyer's request, the court held a section 1368 hearing to determine if defendant was mentally competent to stand trial. Although the court had deemed defendant incompetent to waive his right to counsel, the court did find defendant understood the proceedings and was competent to stand trial.

Competency to waive right to counsel is measured by the same standard as competency to stand trial. (*People v. Nauton* (1994) 29 Cal.App.4th 976,979.) Defendant argues the court erred in denying his request for self-representation, and the prosecution concedes the trial court erred in denying defendant's request. The sole issue is whether the error is reversible per se or subject to a harmless error standard.

A criminal defendant has a federal constitutional right to represent himself. (*Faretta v. California* (1975) 422 U.S. 806, 819 [95 S.Ct. 2525, 45 L.Ed.2d 5621.) The California Supreme Court has determined that the erroneous denial of a timely motion for self-representation is reversible per se. (*People v. Joseph* (1983) 34 Cal.3d 936, 939.) This standard is reflected in earlier appellate court decisions as well. (*People v. Freeman* (1977) 76 Cal.App.3d 302, 309 [use of harmless error standard would render the right of self-representation virtually unenforceable]; *People v. Tyner* (1977) 76 Cal.App.3d 352, 356 [erroneous denial of timely motion for self-representation does not lend itself to review

by any standard short of per se reversal].)

The present case is procedurally similar to *Joseph.* There, the lower court erroneously denied the defendant's request to represent himself. (*People v. Joseph, supra,* 34 Cal.3d at p. 942.) Although the prosecution urged the court to apply the harmless error standard (*Chapman v. California* (1967) 386 U.S. 18, 23 & fn. 8 [87 S.Ct. 824, 17 L.Ed.2d 705]), the court nevertheless applied the reversible per se standard. Fearing an undermining of the Supreme Court's holding in *Faretta,* the court held "a trial court's error in denying an accused the opportunity to plead his own cause cannot be rectified by a 'Monday morning quarterback' determination that no prejudice ensued by forcing an accused to go to trial represented by counsel. Any rule which purported to assess the quality of a would - be *Faretta* accused's representation by the harmless error standard would inevitably erode the *pro se* rule itself." *(People v. Joseph, supra,* 34 Cal.3d at p. 946.) This holding is binding on us. (*Auto Equity Sales, Znc. v. Superior Court* (1962) 57

Cal.2d 450, 455.)

Nonetheless, the prosecution compares the present case to *People v. Wilder* (1995) 35 Cal.App.4th 489, 491, which applied the *Chapman* harmless error standard when the trial court failed to advise the defendant of the dangers of self-representation before allowing him to represent himself. *Wilder* is inapposite. The *Wilder* court did not touch on the fears recognized by the Supreme Court in *Joseph.* Nor did the trial court in *Wilder* prevent the defendant from representing himself. There also was evidence the defendant abused his self-representation rights. *(Id.* at pp. 503-504.) In contrast, here, the lower court prevented defendant from representing himself, and there was no evidence defendant requested to represent himself in bad faith or as a delay tactic. The prosecution also urges us to follow the dissent in *People v. Robinson* (1997) 56 Cal.App.4th 363, 373-377, which refused to follow a per se standard of reversal when the error had no effect on the judgment or the defendant's course of action. In *Robinson,* the lower court erroneously analyzed

whether the defendant could effectively represent himself rather than assessing his competency to waive his right to counsel. (*People v. Robinson, supra, 56* Cal.App.4th at pp. 372-373.) On appeal, the majority did not engage in any discussion regarding which standard of error to apply. Instead, it automatically deemed the denial of self-representation as prejudicial per se despite the defendant's plea of no contest. (*Ibid.*) Similarly, the lower court here improperly confused defendant's competency to represent himself with the ability to waive his right to counsel. As in *Robinson,* the lower court's error must be held to the per se standard of reversal without consideration of defendant's guilty plea.

Robinson also noted that the "right to self-representation is grounded in the Sixth Amendment's right to counsel. [Citation.]" (*People v. Robinson, supra,* 56 Cal.App.4th at p. 369.) "'The Sixth Amendment . . . grants to the accused personally the right to make his defense. . . . [T]he right to self-representation . . . is thus necessarily

implied by the structure of the Amendment.' [Citation.]" (*Id.* at pp. 369-370.) In other words, the right to self-representation is analogous to the right to counsel.

Other courts have also compared the right to self-representation to the right to counsel. (See *People v. Nauton, supra,* 29 Cal.App.4th at pp. 980-981; *People v. Ortiz* (1990) 51 Cal.3d 975, 988.) Thus, using the logic from *Robinson,* the lower court's denial of defendant's request to represent himself is the same as a denial of right to counsel. *Chapman* deemed the denial of right to counsel as a type of constitutional error that is subjected to the per se reversal standard. (*Chapman v. California, supra,* 386 U.S. at p. 23 & fn. 8.) *People v. Ortiz, supra,* 51 Cal.3d at p. 988, also held reversal is automatic when a defendant has been deprived of his right to defend himself in whatever manner he deems best.

The prosecution would like us to weigh a violation of defendant's substantial rights against the possibility that the outcome accomplished the same result as defendant desired

had he represented himself. While the record indicates defendant wanted to pursue a guilty plea on the original charges, we are not permitted to speculate as to how the defendant would have proceeded absent the error. (See *People v. Ortiz, supra,* 51 Cal.3d at p. 988.) In addition, a defendant does not need to show prejudice resulting from a violation of that right in order to have a conviction reversed. (*Ibid.*) As a result, even though the prosecution urges a reversal would not change the outcome, case law indicates this type of error is subject only to the reversible per se standard.

Denial of Defendant's Request for Self-Representation - Estoppel

The prosecution analogizes the present case to one that should be governed by "estoppel by plea," contending defendant got the disposition he wanted anyway and would not have appealed if he had represented himself. The prosecution cites *People v. Borlund* (1996) 50 Cal.App.4th

124, 129, which distinguished new theories raised on appeal based on issues of fact from new theories based on questions of law. New theories based on issues of fact are foreclosed from appeal, but when a question of law is presented, an appellate court may permit a change in theory. (E.g., *Panopulos v. Muderis* (1956) 47 Cal.2d 337, 340; *People v. Curr* (1974) 43 Cal.App.3d 441, 444-445.)

The theories presented by defendant involve a question of law: the applicability of per se standard of reversal to the erroneous denial of a criminal defendant's timely request to represent himself. This question is presented only on the facts as they exist on the record. Defendant does not introduce or assert any new factual mistakes, which would be banned on appeal. Thus, the prosecution may not estop defendant from presenting this question of law because of the position he maintained on the charges at trial.

The prosecution's next contention is predicated on the "theory of trial" doctrine explained in *Emst v. Searle* (1933)

218 Cal. 233, 240-241. Similar to *Borlund,* the doctrine prevents parties from asserting new theories or positions on appeal. (*Ibid.*) Subsequent decisions reflect the doctrine's effect and rationale. (*City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 52 [court had no obligation to consider new issues or theories]; *In re Marriage* of *Moschetta* (1994) 25 Cal.App.4th 1218, 1227 [parties cannot raise new issues on appeal because it is unfair to their opponents who had no opportunity to attack that theory factually or legally in the trial court].)

The "theory of trial" doctrine from *Ernst* cannot be properly applied to the present case. The doctrine has been cited in only two criminal cases since 1933, both involving new factual considerations that were not addressed in the trial court. (*People v. Smith* (1977) 67 Cal.App.3d 638, 655-656; *People v. Smith* (1957) 150 Cal.App.2d 663, 665.) Neither case indicates the "change in position or theory" wording is intended to mean a change in plea. (See generally, *Smith, supra,* 67 Cal.App.3d at p. 655; *Smith, supra,* 150

Cal.App.2d at p. 664.)

Further, the change in position or theory cannot refer to pursuit of remedies for constitutional violations, such as in this case. Even if an appeal from a guilty plea is considered a change in position, it is still permitted. (§ 1237.5.) Presuming defendant's appeal creates a change in position, it is not the same as that which was rejected by *Ernst.* Here, defendant's assertion of an erroneous denial of his self-representation request must not be considered a substantive change in position, but rather a pursuit of an appealable error. Proper appeal of a trial court error does not create a change in position that falls in the same category as one created by new facts or issues.

Defendant's appeal is not precluded under the language of either *Borland* or *Ernst.* Defendant's issue on appeal is a question of law, not fact, and is not prohibited or estopped. Nor do we characterize the pursuit of remedies for trial court errors as a new issue precluded under the theory of trial doctrine.

Withdrawal of Approval of the Negotiated Plea Bargain: Section 11 92.5

Although the erroneous denial of defendant' s self-representation request mandates a reversal of the judgment, we also need to consider defendant's claim the trial court erred by setting aside the initial plea bargain because resolution of this issue could affect subsequent proceedings in the trial court.

During the sentencing hearing, defendant's ex-wife read a victim impact statement recounting the events of her attack and her wishes for a maximum sentence. Subsequently, defendant claimed he wanted to accede to her wishes so she could feel safe and requested the court reinstate the original One Strike charges, making vague threats to "stay in [prison] for longer" if he was not given an indeterminate sentence. Defendant explained he would "extend [his] sentence for as long as [he] need[ed] by just getting in trouble constantly while [he was] behind bars." During a continuation of the hearing, defendant sent a letter to the

court reiterating the same. When the proceedings resumed, the court stated it considered the pre-sentence report, additional letters and attachments, and defendant's comments in rejecting the plea. The court focused on its responsibility to public safety, finding the defendant was "another crime waiting to happen."

According to section 1192.5, the court's approval of a plea is not binding, and it may withdraw its approval in the light of further consideration of the matter. Moreover, the courts have construed the language of section 1192.5 such that trial judges have broad discretion and inherent authority to set aside a negotiated plea and thereby reinstate original charges. (*People v. Johnson* (1974) 10 Cal.3d 868, 873; *People v. Superior Court (Giford)* (1997) 53 Cal.App.4th 1333, 1338; *People v. Olea* (1997) 59 Cal.App.4th 1289, 1299.) Within this broad discretion is the capacity to reject a plea when, upon further consideration, the court deems it is not in the best interests of society. (*People v. Superior Court (Giford), supra,* 53 Cal.App.4th at p. 1338.)

Defendant contends his behavior during the sentencing hearing is irrelevant to the court's decision and outside the scope of "further consideration" for rejecting the plea. But the courts have not so limited the scope of "further consideration." In *People v. Stringham* (1988) 206 Cal.App.3d 184, 194, 199, a newly assigned judge rejected a previously accepted plea bargain even though sentencing proceedings had already begun, finding it was not in the best interests of society. While the decision focused on allowing statements of victims or next of kin during sentencing proceedings, the appellate court held a judge may also consider "statements in aggravation and mitigation" as well as "[i]nformation from . . . other sources [] available to a court pondering whether to withdraw its approval of a negotiated disposition. It cannot be assumed that no attention will be paid to them by the court. The potential for reflection and a change of the judicial position is obvious and statutorily sanctioned." (*Id.* at p. 194.)

Like *Stringham,* the trial court in this case also

considered statements and letters during the sentencing proceedings, from defendant, his ex-wife, and other family members, criticizing the sentence. *Stringham* also refused to limit the scope of when a court may withdraw approval, finding authorization to withdraw "well after the start of proceedings accompanying sentencing." (*People v. Stringham, supra,* 206 Cal.App.3d at p. 196.) Thus, we find the trial court did not abuse its discretion in withdrawing its approval during the sentencing proceedings.

We find further support in *People v. Thomas* (1994) 25 Cal.App.4th 921, 925-926, which rejected a plea when new information arose regarding a defendant, and in *People v. King* (1981) 123 Cal.App.3d 406, 408, which rejected a plea when the court became more "fully informed" about the case. Again, the court has the broad discretion to withdraw its prior approval of a plea upon sentencing. (*People v. Johnson, supra,* 10 Cal.3d at p. 873.) This necessarily implies we may consider any information up to that point.

We find the trial court did not abuse its discretion in considering defendant's statements and behavior as "new information" as in *People v. Thomas, supra,* 25 Cal.App.4th at p. 925. The court rejected the plea as offensive to the best interests of the public, citing defendant's open-ended threats to commit future crimes. Contrary to defendant's argument, the court's rejection of the plea agreement did not constitute punishment for potential future crimes. The prevention of defendant's intent to commit future crimes was in the best interests of society, whether this includes prisoners, prison officials, or the public in general. As such, the court's rejection of the plea was within its discretion and motivated by proper factors.

Defendant misuses *People v. Ames* (1989) 213 Cal.App.3d 1214, 1217, as authority preventing the court from reinstating the original charges. While it is true that once the court accepts the terms of a plea bargain it lacks jurisdiction to alter its terms, the trial court here did not attempt to change the terms of an accepted plea agreement.

(Pen. Code, § 1192.5.) In fact, the court expressly rejected the plea agreement. Thus, the court was not bound by the terms of the agreement and was within its discretion to reinstate the original charges. (See *People v. Green* (1982) 142 Cal.App.3d 207, 215 [should the court consider the plea bargain to be unacceptable, its remedy is to "reject it, not to violate it, directly or indirectly"]; *People v. Olea, supra,* 59 Cal.App.4th at p. 1300 [court may set the plea aside and reinstate the dismissed charges].)

Good Cause and Withdrawal of Defendant's Plea: Section 101 8.

Defendant also misstates section 101 8, which governs withdrawals of pleas, by asserting that a defendant must show good cause to withdraw his plea. According to section 1018, the court may permit a plea of guilty to be withdrawn and a plea of not guilty substituted upon a showing of good cause.

While the record indicates that defendant wanted to reject the plea bargain himself, the prosecution correctly

notes there were no proceedings or pleadings regarding an official withdrawal. Furthermore, defendant did not want to withdraw his guilty plea in order to substitute a not guilty plea. Instead, defendant only wanted to plead guilty to the original charges. We find a required proof of "good cause" moot under these circumstances even if there was a formal request to withdraw the plea.

Furthermore, section 1018 states that "every plea shall be entered or withdrawn by the defendant himself. . . ." Defendant's contention that he could not make a request for withdrawal of his plea because he was represented by counsel misconstrues section 1018 and is without merit. In fact, section 1018 requires the defendant withdraw the plea personally, whether he is represented by counsel or not. (*Johnson v. Superior Court* (1981) 121 Cal.App.3d 115, 119 [defendant must express his authorization or adoption of a motion made on his behalf to withdraw his plea in order to comply with section 10181.) Nonetheless, the court rejected the plea sua sponte for reasons discussed above, not on

defendant's sole statement that he wanted to reject his plea agreement.

The good cause requirement of section 1018 prevents arbitrary withdrawals of guilty pleas for the purpose of substituting a not guilty plea. This requirement has no application when defendant intends to substitute a guilty plea. Further, section 1018 does not prevent defendant from withdrawing a plea personally regardless of representation. We are not persuaded by defendant's argument since the court did not recognize a withdrawal and rejected the plea on its own motion.

DISPOSITION

The judgment is reversed.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.

APPENDIX B

APPENDIX B

Court of Appeal, Fourth Appellate District, Division Three - No. GO27376

S115489

IN THE SUPREME COURT OF CALIFORNIA

En Banc

SUPREME COURT
FILED JUNE 11, 2003
Frederick K. Ohlrich, Clerk

_____
Deputy

PEOPLE, Plaintiff and Respondent,

V.

ROBERT HARTLEY COLLINS, Defendant and Appellant.

Petition for review DENIED.

GEORGE

_____
Chief Justice

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **ROBERT HARTLEY COLLINS,** Defendant and Appellant.	S_____ SUPREME COURT FILED APRIL 28, 2003 FREDERICK K. OHLRICH

Fourth Appellate District, Division Three, No. G027376
Orange County Superior Court No. 97NF3729
The Honorable Frank F. Fasel, Judge

PETITION FOR REVIEW

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Court Rules

California Rules of Court
Rule 28 1

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

S____

v.

ROBERT HARTLEY COLLINS,

Defendant and Appellant.

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Respondent respectfully petitions this Court to grant review, under rule 28 of the California Rules of Court, following the March 24, 2003 unpublished decision of the Court of Appeal, Fourth Appellate District, Division Three. This case raises an open question regarding a defendant's right to self-representation under *Faretta v. California* (1975) 422 U.S. 806, 807 [95 S.Ct. 2525, 45 L.Ed.2d 562](*Faretta*).

ISSUE PRESENTED

Is *Faretta* error in plea and sentencing proceedings reversible per se?

REASONS FOR REVIEW

The defendant in this case wanted to represent himself so that he could plead guilty to the charges filed in the indictment. Although his request for self-representation was denied, he waived jury trial and, after a slow plea, ultimately got the exact conviction and sentence he wanted. The Fourth District Court of Appeal, Division Three, reversed his conviction for *Faretta* error, holding that it had no choice but to apply the per se reversal rule annunciated in *People v. Joseph* (1983) 34 Cal.3d 936, 946 (*Joseph*). But a careful reading of *Joseph,* and the relevant decisions from the United States Supreme Court, shows that this is an open question. No court has held that *Faretta* error at plea and sentencing proceedings is reversible per se.

Indeed, *Joseph* and the pertinent decisions by the United States Supreme Court are carefully limited to a defendant's right to conduct his own defense, with an emphasis on the right to defend oneself at trial. The error is reversible per se, under these particular circumstances, because application of a harmless error analysis would all but eviscerate the right given that a defendant is almost always better off being represented by a lawyer at trial. This is not necessarily true in plea and sentencing proceedings. It makes no sense to reverse a case,

such as this one, where the defendant did not want to conduct a defense. The defendant wanted to plead guilty and eventually he got the exact conviction and sentence he wanted. And it certainly makes no sense that the negligible dignity interest afforded by *Faretta*, in plea and sentencing proceeding before a judge, should always outweigh the potential harm to the victims posed by the threat of retrial, or the increased burdens placed upon the prosecution and the court.

The problem is that the lower courts feel bound by *Joseph*. The exception to the rule of per se reversal must be established by this Court. Thus, the People respectfully ask this Court to grant review to examine whether *Faretta's* rule of per se reversal applies in plea and sentencing proceedings.

PROCEDURAL AND FACTUAL HISTORY

a. The Crimes

On December 19, 1997, appellant sexually assaulted and threatened to kill his former wife Jennifer while their three-and-a-half year old daughter, and another child, an infant, were in the apartment. (CT 4-8; Supp. CT 3; CT 7.) About 3:50 a.m., he used a ruse to enter and concealed a rag and a bottle of chloroform with the intent to render Jennifer unconscious. In the apartment's kitchen, appellant placed a rag doused with

chloroform over her face and the two struggled and fell to the floor. Jennifer hit appellant on the head with a water glass, which caused him to drop the rag, but in the next moment he procured a knife from the kitchen counter, held it to her throat, and dragged her into the living room. (Supp. CT 3-4; CT 4-13.) There, appellant poured chloroform onto one of the couch pillows and again attempted to render her unconscious. He stopped when their daughter entered the living room. Seeing the girl, he ordered her to her room and dragged Jennifer into the master bedroom, where he forced her to the floor and threatened to kill her. He eventually told her to get on her knees, and while holding the knife, commanded her to orally copulate him. She did so twice. (Supp. CT 4-5; CT 14-25.) Appellant then bound and gagged Jennifer. He said that he badly wanted to kill her, and that he had been planning to do so for a long time, but that he could not go through with it. (Supp. CT 5, 9; CT 25-28.) He eventually freed her around 6 a.m., after a two-hour ordeal. (Supp. CT 6; CT 30-34.)

b. Proceedings In The Trial Court

On March 23, 1998, the Orange County District Attorney filed an information charging appellant with forcible

oral copulation (count 1; Pen. Code, § 288a, subd. (c))[1/], assault with intent to commit rape (count 2; §§ 220, 261, subds. (2)(3)), corporal injury on the mother of a child (count 3; § 273.5, subd. (a)), first degree burglary (count 4; §§ 459, 460, subd. (a)), false imprisonment by violence (count 5; § 236), and misdemeanor child abuse (count 6; § 273a, subd. (b)). With respect to count 1, the information further alleged that appellant used a deadly weapon (§ 12022.3, subd. (a)) and that the crime was punishable under the one-strike rape law because of the residential burglary (§ 667.61, subds. (a)(b)(e)(2)) and the weapon use (§ 667.61, subds. (a)(b)(e)(4)). (CT 57-59.)

On September 11, 1998, appellant was represented by counsel and pled guilty to counts 1 through 6 and admitted the weapon use allegation. (CT 77-80; RT 19-30.) In exchange, the prosecutor struck the one-strike rape allegations, which left a potential maximum prison term of 22 years and eight months rather than a mandatory indeterminate life term. (CT 80; RT 23.) At sentencing on February 19, 1999, appellant was moved by the statements of the victim and her sister and asked the court to reinstate the one-strike rape allegations and put him in prison for life. (CT 85; RT 37-38.) Appellant threatened to

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1. Further statutory references are to the Penal Code unless otherwise specified.

commit crimes in prison in order to extend his sentence if the court refused. (RT 48.)

The case was continued to March 12, 1999, at which time the court stated that it understood appellant's comments as an implied future threat of harm to prison inmates. (RT 53.) In the interim, appellant had sent the court a letter in which he said that he would not harm inmates but would "do everything possible to pick up D.A. referrals." (RT 53; Sealed CT 148-149.) Appellant essentially told the court that he would commit crimes to extend his sentence (such as drug offenses), but that he would not hurt anyone. (RT 54-55.) The court said that it could not sanction a plea bargain when appellant was threatening to commit future crimes if he were not given a life sentence. Hence, the court rejected the plea bargain, set aside the plea, and reinstated the charges. (CT 87-89A; RT 59.)

After the charges were reinstated, appellant's retained attorney stated there were irreconcilable differences with her client and, after confirming that appellant wanted to fire her, asked to be relieved. Appellant said that he did not need an attorney and asked to represent himself. The court relieved retained counsel, and after confirming that appellant intended to plead guilty to all the charges and the one-strike rape allegation without going to trial, appointed a psychologist to render an opinion concerning whether appellant had the

capacity to represent himself. (RT 61-63; CT 90-91A; Aug. RT 1-6; Sealed CT 109-110.)

On May 21, 1999, the court found that appellant did not have the mental capacity to make a knowing and intelligent waiver of his right to an attorney, not as a matter of intelligence, but rather as a result of psychological and emotional difficulties. (RT 72-77; CT 92; Sealed CT 122-124.) It appointed a lawyer. (CT 93; 6-4-99 RT 6-7.)

On July 9, 1999, appellant's appointed lawyer asked the court to conduct a Penal Code section 1368 evaluation. (Aug. RT 7.) The court suspended proceedings and ordered an examination. (CT 95-96A; Aug RT 8-9.) On August 27, 1999, the court found that appellant had not rebutted the presumption of mental competence and reinstated criminal proceedings. (Sealed CT 113-121, 135-139; CT 98-99; RT 80.) In so ruling, the court committed *Faretta* error because competence to waive the right to counsel must be measured by the same standard as competency to stand trial. (*Godinez v. Moran* (1993) 509 U.S. 389, 400-401 [113 S.Ct. 2680, 125 L.Ed.2d 321]; *People v. Welch* (1999) 20 Cal.4th 701, 733.)

On November 19, 1999, appellant's appointed lawyer told the court that appellant wanted to submit the case on the transcripts (a slow plea) to avoid bringing his former wife and daughter into court. (RT 82-84.) Thereafter, appellant waived

his right to a jury trial. (CT 102; RT 85-88.) The court took evidence in appellant's slow plea (consisting of the preliminary hearing examination, the police report, and two forensic reports) and the defense presented no evidence or argument. (RT 96-99, 102; CT 103; Supp. CT; Exhs. 1-4.) The trial court then found appellant guilty of all charges and found true all allegations, and sentenced appellant to a mandatory indeterminate prison term of 25 years to life. (RT 102-103; CT 104-105, 255-256.)

c. The Court Of Appeal's Opinion

The Fourth District Court of Appeal, Division Three, upheld the trial court's decision to reinstate criminal proceedings (Opn. at 8-11), but reversed because of *Faretta* error. The Court of Appeal held that the "type of error" exhibited in this case was subject "only to the reversible per se standard." (Opn. at 6.) The Court of Appeal held that it was bound to reverse this conviction under *Joseph* and the rule of stare decisis. (Opn. at 5.)

ARGUMENT

1.

REVIEW IS NECESSARY TO DECIDE WHETHER THE RULE IN *PEOPLE V. JOSEPH* (1983) 34 CAL.3D 936, MAKING *FARETTA* ERROR REVERSIBLE PER SE, APPLIES TO PLEA AND SENTENCING PROCEEDINGS

Neither the United States Supreme Court, nor this Court, has held that *Faretta* error should be reversible per se in plea and sentencing proceedings. The language of the cases themselves, as well as strong policy concerns, suggest that this should not be the law. Review is necessary to settle this important question, and protect the victims, prosecution, and the court from the prospect of unnecessary retrials.

The high court's decision in *Faretta* says that a state may not force a lawyer upon a criminal defendant "when he insists that he wants to conduct his own defense." (*Faretta v. California*, *supra*, 422 U.S. at 807; emphasis added.) The opinion stresses that the Sixth Amendment "constitutionalizes the right in an adversary criminal trial to make a defense as we know it." (*Id.* at 818; emphasis added.) The "right to defend is personal" because it is the defendant, not the lawyer, who will bear the consequences of conviction. (*Id.* at 834; emphasis

added.) Thus, the accused must acquiesce in representation before the defense adopted at trial is "*his* defense." (*Id.* at 821; emphasis in original.)

The United States Supreme Court made this reading of *Faretta* explicit in *Martinez v. Court of Appeal of California* (2000) 528 U.S. 152, 161 [120 S.Ct. 684, 145 L.Ed.2d 597](*Martinez*). There, the Court held that the right to self representation did not extend to appeal. (*Id.* at 154.) In so doing, the Court specifically held that, "Our conclusion in *Faretta* extended only to a defendant's 'constitutional right to conduct his own defense.'" (*Ibid*; emphasis added.) The Court likewise made many statements focusing on the right to "defend oneself at trial." (*Martinez v. Court of Appeal of California*, *supra*, 528 U.S. at 161.) For example, the Court stated that "the *Faretta* majority found that the right to self-representation at trial was grounded in part in a respect for individual autonomy." (*Id.* at 160; emphasis added.) The Court stated that, "Although we found in *Faretta*, that the right to defend oneself at trial is 'fundamental' in nature (citation), it is clear that it is representation by counsel that is the standard, not the exception." (*Id.* at 161, emphasis added.) The Court also stated that, even at the trial level, "the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's in acting as his own lawyer." (*Id.* at

162; emphasis added.)

The same sort of limiting language is found in the high court's cases discussing the rule of per se reversal. In *McKaskle v. Wiggins* (1984) 465 U.S 168, 177, fn.8 [104 S.Ct. 944, 950, 79 L.Ed.2d 122], the Court stated in dicta that, "Since the right to self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis." In the next paragraph, the Court stated, "Moreover, the defendant's right to proceed *pro se* exists in the larger context of the criminal trial designed to determine whether or not a defendant is guilty of the offense with which he is charged." (*Id.* at 177-178; emphasis added.) Likewise, the high court's decision in *Arizona v. Fulminante* (1991) 499 U.S. 279, 310 [111 S.Ct. 1246, 113 L.Ed.2d 302], stated that the rule of per se reversal applies to the "the right to self-representation at trial." (emphasis added.) Nothing in the high court's decisions remotely extends the rule of per se reversal to plea and sentencing proceedings.

This Court's decision in *People v. Joseph*, *supra*, 34 Cal.3d 936, creating a rule of per se reversal for *Faretta* error, was also limited to the right to present a defense at trial. The opinion explained that the primary motivation for *Faretta* was "respect for the accused's freedom of choice to personally

conduct his own defense." (*People v. Joseph*, *supra*, 34 Cal.3d at 946, emphasis added.) The Court held that a reviewing court could not apply a prejudice analysis when an accused was forced to "go to trial represented by counsel." (*Ibid.*; emphasis added.) The Court noted that a rule of per se reversal guaranteed that the defendant was not "deprived of his free will to make his own choice, in his hour of trial, to handle his own case." (*Ibid.*; quoting *United States v. Dougherty* (D.C. Cir. 1972) 473 F.2d 1113, 1128; emphasis added.) The Court held that to apply a harmless error analysis under these circumstances would erode the right to self-representation because criminal defendants would usually be better served by skilled counsel. (*Id.* at 946-947.) Moreover, it would be difficult to assess the effect of the error because "an assessment of why or how an accused's trial was disadvantaged by injecting an undesired attorney into the proceedings would require an impossibly speculative comparison between the accused's undisclosed pro se strategy and that of counsel." (*Ibid*; emphasis added.) Thus, like the United States Supreme Court, this Court has never decided whether a per se reversal rule should apply in plea and sentencing situations. The question is open.

Further, the reasoning in *Joseph* does not necessarily extend to the situation presented in this case. Two other

important rules of law support this position. First, even when represented by a lawyer, a defendant's decision to plead guilty is a matter lying within the defendant's, rather than his counsel's, ultimate control. (*People v. Medina* (1990) 51 Cal.3d 870, 899.) And when entering a plea, a court must take express waivers from the defendant. (*Boykin v. Alabama* (1969) 395 U.S. 238 [89 S.Ct. 1709, 23 L.Ed.2d 274] ; *In re Tahl* (1969) 1 Cal. 3d 122.) These rules help to guarantee that, when a defendant pleads guilty, he is doing what he wants to do. They protect a defendant's dignity interest, and ensure that he is the "master"of his plea. (See *Faretta*, *supra*, 422 U.S. at 820.) Second, once a defendant has pled guilty, he is no longer entitled to the presumption of innocence. While this does not eliminate his right to counsel at sentencing, the nature of the right to self-representation changes dramatically. (See, *Martinez*, *supra*, 528 U.S. at 162-163.) This is especially true where the sentence to be imposed is mandatory. Hence, in plea and sentencing proceedings, there is little chance that counsel will run rough-shod over a defendant's defense strategy. Substantial protections assure that the defendant is doing what he wants to do, and the proceedings are before a judge rather than a jury. These circumstances greatly undermine the need for a rule of per se reversal.

The foregoing analysis shows that *Faretta* and the

cases requiring per se reversal are not controlling when a defendant is not seeking to present a particular defense at trial. It also shows that there are fundamental differences between the right to self-representation at trial and the right to self-representation at plea and sentencing proceedings. This is not to say that the right to self-representation does not exist during these proceedings, nor is it to say that a defendant's dignity interest is non-existent in these proceedings, but it is to say that a rule of per se reversal makes no sense. This case demonstrates why.

Here, the defendant wanted to represent himself, not to defend himself, but so that he could plead guilty to all the charges. He did not want to present a particular defense. In fact, he did not want a jury trial and he did not want to present a defense. He personally waived the right to a jury trial in favor of a slow plea before a judge, and elected to present no defense evidence. This guaranteed a guilty verdict on all counts. Further, the guilty verdict under the one-strike rape law mandated an indeterminate life sentence. It is also important to note that this was not a passing fancy or an impetuous act - the defendant steadfastly maintained his position for eight months until he eventually got the indeterminate life sentence he desired. These facts show that the defendant got exactly what he wanted, with the sole exception that he got it in the company

of an attorney. A rule of per se reversal makes no sense under these circumstances.

It makes even less sense when one considers the rights of the victims. The defendant's former wife was forced to endure two hours of sexual assaults and death threats while her two young children slept in adjacent rooms. If the family has managed to settle in the past five years, the prospect of a retrial in this case again will threaten to again rip their lives apart. While it is possible that the defendant will again plead guilty, he may not. He may have changed his mind after five years in prison. Should he now be permitted to drag the victims through trial (his former wife and daughter who is now eight), and perhaps escape punishment, because the trial court erroneously prevented him from representing himself so that he could plead guilty?

While less compelling than the harm to the victims, the court and prosecution will also be prejudiced by a retrial in this case. As the Court stated in *Morris v. Slappy* (1983) 461 U.S. 1, 14 [103 S.Ct. 1610, 75 L.Ed.2d 610], "The spectacle of repeated trials to establish the truth about a single criminal episode inevitably places burdens on the system in terms of witnesses, records, and fading memories, to say nothing of misusing judicial resources." (*Ibid.*) Such is the case here.

The irony of this sort of situation was alluded to by

Justice Chin in his recent concurring opinion in *People v. Dent* (2003) 2003 D.A.R. 3911. There, Justice Chin pointed out that the capital defendant whose *Faretta* right was violated would not be precluded from requesting a lawyer upon retrial, thereby giving the defendant two trials in which he was represented by counsel. (*Id.* at 3914.) The irony would be equally compelling here, since the defendant would not be compelled to plead guilty. He could get a lawyer and could decide to go to trial. He could put the prosecution at the decided disadvantage of trying this case, for the first time, many years after the events. Further, he could put the victims through tremendous and unnecessary trauma - or worse yet - get a substantially reduced plea agreement because the victims are no longer willing to testify.

The People also want to point out that these issues arise often enough to deserve the consideration of this Court. (See e.g. *People v. Robinson* (1997) 56 Cal. App.4th 363, 370 fn. 2 [2-1 decision holding that *Faretta* issue could be raised after plea of no contest]; see also the pending capital appeal in *People v. Marlow* (S026614)). For these reasons, the People respectfully ask this Court to grant the petition for review.

CONCLUSION

Because neither this Court, nor the United States Supreme Court, has held that denial of the right to self-representation should be reversible per se outside trial proceedings, this case presents an important and undecided question of federal constitutional law. The language of the seminal cases, and strong policy concerns, suggest that a rule of per se reversal should not apply to these situations. Review is

warranted to settle this important issue, and protect the victims, prosecution, and the court from the prospect of an unnecessary trial.

Dated: September 2, 2003

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